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IN the article which we elsewhere print on Insurable Interest in Human Life, our readers will recognize the pen of Hon. James O. Pierce, of Memphis, whom we are glad to number among our occasional contributors. Few members of the profession have more thoroughly studied the law of insurance, and none are able to bring to the examination and comparison of adjudications a closer attention and more accurate discrimination.

"Actions Speak Louder than Words."

Hayes v. Kelley, recently determined in the Supreme Judicial Court of Massachusetts, was an action for lime, etc., furnished according to account annexed. Answer, general denial. Case referred to auditor, whose report at the trial in the Superior court, before Brigham, C. J., was objected to on the ground that the plaintiff's books were impromperly admitted in evidence at the hearing. The objection was overruled, and the report was read to the jury, to which the defendant excepted. The man who once knew about the delivery was dead. The plaintiff called the defendant as a witness, but got little that was material to the issue from him. He was uncertain, he said; he did not remember; he might have had some of the goods, and he might not—at first he thought he had, and then he thought he hadn't; finally, he did not think he had any of them. The plaintiff then introduced a witness who testified that he presented the bill in suit to the defendant several times, at one of which the defendant objected to one item, in part, and at another time told his clerk to put the bill in the closet and when at leisure he would look at it, but he never at any time promised to pay it. When the evidence was closed, the plaintiff asked leave to withdraw the auditor's report. Leave was granted. The defendant excepted. The presiding justice, among other things, instructed the jury that when a bill of particulars is presented to a party, his conduct may be such, without his using any words to that effect, as to warrant a jury in finding such conduct to be an admission that the bill is accurate and is actually due. To this also the defendant excepted. The jury found for the plaintiff. The case was argued at the November sitting. We print below the brief of our correspondent, Pelham, who was of counsel for the plaintiff:

HAYES v. KELLEY.

PLAINTIFF'S BRIEF.

The prayers relating to the books became wholly immaterial, because the books were not in evidence. They were used only before the auditor; and when the auditor's report was withdrawn, all evidence from the books was withdrawn. The first question then, is—Had the presiding judge the right to permit the report to be withdrawn—or, to speak more accurately, to strike it out of the case? The plaintiff offered it; the defendant objected to its introduction; the presiding judge admitted it, notwithstanding the objection, and allowed the defendant his exception. What is this report? It is merely evidence—and the exception to striking it out, presents simply the question—Whether evidence, to which exception has been taken, and which has been admitted notwithstanding the exception, can afterwards be waived by the party offering it, and, in the discretion of the presiding judge, be stricken out? And I submit that it may be—and I add, is done every day.

The only other exception is, that the judge, among other things not objected to, instructed the jury that "where a bill of particulars is presented to a party, his conduct may be such, without his using any language to that effect, as to warrant a jury in finding such conduct to be an admission that the bill is accurate and is actually due." And unless this is true, there is nothing in the proverb that "actions speak louder than words;" or as Locke better expresses it—Actions are the best evidence of men's principles. To justify the remark of the judge, it is not necessary that actions should speak *loud*, but only that they should be intelligible; for the question does not respect noise, but perspicuity. And the eye judges of conduct not less certainly than the ear. When I see men inflating a balloon, I infer that somebody is contemplating to go up. When I present a bill of twenty different items to a man who owes me, and he turns to his journal and compares the bill with that, and with his pencil puts against each item a sign indicating a correspondence between his journal and the bill, and then opens his money-drawer and I see therein a file of unpaid bills, and mine that I had sent him a month ago, on top, and a broken eye-glass, a few envelopes and second-hand pens, a Boston cracker and a shoe-string—but no money—and he drops a tear into the drawer, and then takes down his check-book, and I see his bank account is already overdrawn, and he looks at me as though he needed a friend, and sadly shakes his head, and folds the bill and lays it away—is not his conduct such as to lead me to believe that he is satisfied the bill is right and wants to pay it, but has not the means? On the trial of an indictment for the larceny of a horse, it was said the jury were warranted in finding that the horse was of some value, upon evidence that he was a dark sorrel horse, weighing about nine hundred pounds, had a long tail and a bruise on one hip, and had been driven a long distance. Commonwealth v. McKenney, 9 Gray, 114.

Rescript by GRAY, C. J.—It was within the discretion of the judge to allow the plaintiff to withdraw the auditor's report. The instructions requested were immaterial, and those given were correct. Exceptions overruled.

Insurable Interest in Human Life.

The character and quality of the interest in the life of another which will support a policy of insurance upon that life, do not seem to be well settled, in several important respects.

1. It is so thoroughly settled as to have become axiomatic, that a wife has an insurable interest in the life of her husband. A late writer (May. on Ins. § 107), lays this down as "of course," without citing any authorities. The point has been expressly ruled as a commmon law doctrine, in Reed v. Royal Exch. Ass. Co., Peake's Add. Cas. 70 (1795) reported in 3 Bigelow's Cas. 2. Also in Baker v. Union Mut. Life Co, 43 N. Y. 283; Gambs v. Convenant Life Co., 50 Mo. 44; St. John v. Amer. M. Life Co. 2 Duer, 419. The basis of this interest is not defined. From the analogies of other insurable interests, which have a pecuniary basis, it would seem to be the support which the wife is entitled to claim from the husband (see 2 E. D. Smith, N. Y. 268). The insurable interest of a reputed but not legal wife, in the life of the husband with whom she cohabited, was sustained on this ground in Equit

able Life Soc. v. Paterson, 41 Geo. 338. And a woman engaged to be married was held to have such an interest in her intended husband's life, in Chisholm v. Natl. Cap. Life Co., 52 Mo. 213. It may be assumed that love and affection alone should furnish a sufficient basis for the wife's insurable interest, in analogy to other marital relations. But this does not appear to have been established by the decisions. They are simply pervaded with the doctrine that the interest exists, which is generally recognized by the courts as "of course."

2. Whether any other relationship will alone support a life policy, may be doubted. A *dictum* of Clifford, J., in Phœnix Mut. Life Co. v. Bailey, 13 Wall. 616, asserts the general proposition in these words: "It is sufficient to show that the policy is not invalid as a wager policy, if it appears that the relation, whether of consanguinity or affinity, was such * * * as warrants the conclusion that the beneficiary had an interest, whether pecuniary or arising from dependence, *or natural affection*, in the life of the person assured." It is reported as lately decided by a Pennsylvania court, in Kane v. Reserve Life Co., 1 Cent. Law Jour. 345, that the relation of father and son suffices to establish an insurable interest in the life of the father, and in 6 Gray (*infra*) it is said as a *dictum*, that without pecuniary interest, and not on the ground of support, but merely on considerations of strong morals and the force of natural affection, the father's policy would be supported.

But the decisions generally are not in accord with thsee *dicta*. In Miller v. Eagle Life Co., 2 E. D. Smith (N. Y.) 268, Woodruff, J., draws from the cases the following deductions:

"A strong probability of pecuniary benefit from the continuance of the life, without a strict legal claim to such benefit, is sufficient to save the contract from being deemed a wager." "From the nature of the case, an insurance upon life is an insurance of the benefits to result to the insured from its continuance. These are all that render the life insured valuable to him."

A majority of the reported cases will be found to be rested upon such pecuniary considerations or expectations. Thus, it has been held that a sister had an insurable interest in the life of her brother, where she had been supported by him. Lord v. Dall, 12 Mass. 115 (1815). And that a father has this interest in the life of his minor son, because he is entitled to his earnings. Mitchell v. Union Life Co., 45 Maine, 104 (1858); Loomis v. Eagle Life Co., 6 Gray, 396 (1856). *Per contra:* A father has no insurable interest in the life of his son, merely from relationship. Halford v. Kymer, 10 Barn. & Cres. 724 (1830); nor does the mere relationship of a brother suffice to furnish such an interest. Lewis v. Phœnix Life Co., 39 Conn. 100 (1872).

3. The weight of authority is, therefore, evidently in favor of resting all insurances on lives of relatives upon a pecuniary basis, such as supports a policy as between debtor and creditor. As to this there is now no apparent conflict in the authorities. Any pecuniary interest will support a policy, which will not be measured with exactness by the extent of that interest. But in case of debtor and creditor, the amount of the policy must not be so exceedingly disproportionate to the debt as to make the transaction in effect a wager. Cammack v. Lewis, 15 Wall. 643; Mowry v. Home Ins. Co., 9 R. I. 346. In 15 Wall. case the debt was $70.00, and the policy was $3,000, and this was held a wager.

4. There must, however, be *some* pecuniary interest in the life insured. It was said in Trenton Mut. Life Co. v. Johnson, 4 Zabr. (N. J.), 576, that no pecuniary or insurable interest is necessary to support the contract. But this is doubtless to be regarded as a *dictum*, inasmuch as there was in that case a pecuniary interest existing, which would support the contract according to the weight of authority. Other *dicta* to similar effect appearin the decisions; but there is no reported decision to this effect, unless it be Kane v. Reserve Life Co., *supra*. The New York Court of Appeals decided that a policy would be void when taken out by one as beneficiary, who had no pecuniary interest in the life insured; and that this was the rule at common law, of which the statute, 14 Geo. 3, against wagering policies, was merely declaratory. Ruse v. Mut. Ben. Life Co., 23 N. Y. 516, 24 do. 653. (But the same court afterwards avoided this very question in Rawls v. Amer. Mut. Life Co., 27 N. Y. 282). Mr. May has expressed the general result from the reported decisions, in these words: "When it is said that fire, life and other insurances where valued policies obtain, are contracts of indemnity, it is simply intended that to support them the insured must have some interest in the thing insured. The amount of this interest, and the amount to be paid in case of loss, may be fixed by arbitrary agreement, even before the loss" (§ 7). "When the insured has nothing to lose, but everything to gain by the happening of the event insured against, it would be dangerous and demoralizing to subject the insured to so great a temptation, to destroy the property or the life upon which the insurance is effected. A sound public policy will not sanction any such temptation" (§ 75).

5. The policy being issued to one who has the insurable interest, can it afterwards be assigned or sold to one who has no such interest? Mr. May answers this question in the negative, considering it "an attempt to do indirectly what the law will not permit to be done directly" (§ 398). But the decisions do not agree on this point. Such an assignment is supported in St. John v. Amer. Mut. Life Co., 2 Duer, 419, and 13 N. Y. 31, and Valton v. Natl. Life Co., 22 Barb. 9, and 20 N. Y. 32, on the ground that the policy being originally valid, the insured had a right to dispose of it as he saw fit, and the assignment did not change the liability of the insurer. Such an assignment is declared void, as a mere speculation in life policies, in the later cases of Stevens v. Warren, 101 Mass. 564; and Franklin Life Co. v. Hazzard, Sup. Ct. Indiana, 2 Ins. Law Jour. 180. The last case is an exceedingly well reasoned one, and may perhaps be accepted as furnishing the better version of the law; though Mr. Bigelow, reporting the case in 3 Bigelow's cases, p. 559, doubts its correctness. Mr. May on the other hand, endorses it (§ 398).

6. If the person whose life is insured may not assign the policy to a stranger after it is issued, may he do the same thing contemporaneously with its issuance? Can A. contract with an insurer, for a policy on his own life which shall be from the beginning payable to B., who has no interest in that life? This was the subject of a judicial doubt in Wainwright v. Bland, 1 Mees. & W. 32 (1836). But the doubt was resolved in the negative in Shilling v. Acc. Ins. Co., 2 Hurls. & N. 42 (1857), where it was held that such insurance is void. In this

country some exceedingly nice distinction, have been drawn in considering this question. For while in Stevens v. Warren, *supra*, the Supreme Court of Massachusetts held the assignment of a policy after issuance, to one who had no insurable interest, void (intimating that the consent of the insurer might have validated it), the same court held in Campbell v. N. E. Mut. Life Co., 98 Mass. 381, that one taking out a policy of insurance on his own life, might make it payable to whom he pleased, without regard to interest. *Dicta* to the same effect are found in Rawls v. Amer. Mut. Life Co., 27 N. Y. 282 (1863), and Amer. Life & H. Co. v. Robertshaw, 26 Penn. St. 189 (1856), in both of which cases the insurable interest actually existed. The Superior Court of N. Y. City, in Hogle v. Guardian Life Co., 4 Abb. Pr. (N. S.) 346 (1868), upheld a policy so effected, declining to consider the question of interest which was held to be immaterial. But the Court of Appeals of New York seemingly cast doubt upon that proposition, by saying in the later case of Baker v. Union Mut. Life Co., 43 N. Y. 283 (1871), that one can make such insurance on his own life payable to any one *having an interest in his life*. And the Supreme Court of the United States, in the still later case of Cammack v. Lewis, 15 Wall. 643 (Dec., 1872), has plainly taken the opposite view. The policy in this case was taken out by Lewis upon his own life, but for the benefit of Cammack, who was held to be protected only to the extent of his actual pecuniary interest in the life of Lewis, all beyond that being, as to Cammack, a mere wager.

The question whether the insured or the beneficiary was the contracting party, does not seem to have been taken into account, in the case cited in note 2, *supra*. Nor is it discussed especially in 15 Wall. The reasoning of the cases in 98 Mass. 27 N. Y., 4 Abb. Pr. R. and 26 Penn., is, that as the contracting party has an insurable interest in his own life, the contract has the proper basis at its inception, and will therefore be supported. These cases exhibit the tendency of the American courts. But the doctrine advanced by them seems plainly open to Mr. May's criticism of "doing indirectly what the law will not permit to be done directly;" a practice which the 15 Wall. case refuses to sanction. If the beneficiary may not himself contract for insurance on another's life in which he has no interest, because it would be a mere speculation upon human life, 23 N. Y. 516, 24 N. Y. 653, 39 Conn. 100 (*supra*) the questions may well be asked: 1. Is it any less a wager when the insured himself makes the contract for the benefit of one who has no interest? 2. How can the insurable interest of A. in his own life support a policy, which, by its own terms, can never, for an instant of time, even at its inception, inure to the benefit of A., his widow, minor children, executors or creditors, or of any one else having an insurable interest in that life? To the first question the cases in 98 Mass. and 15 Wall. give contrary answers. The second needs to be plainly and authoritatively answered by the American courts.

J. O. P.

—THE world continues to move. A young lady desirous of entering the law school of Cuzco, an institution supported by the state, wrote to the government to inquire if her sex were a bar to her admission. The Minister of Justice promptly replied that all Peruvian citizens should enjoy equal rights; that women were considered by the law as on the same footing with men, as far as the privileges to be accorded by the republic were concerned, adding that it was a matter of peculiar pleasure to the administration to improve the opportunity of giving publicity to such a declaration.

Destruction of Buildings to Prevent the Spread of Fires.

FIELD v. THE CITY OF DES MOINES.

Supreme Court of Iowa, October Term, 1874.

Hon. J. M. BECK, Chief Justice.
" WM. E. MILLER, }
" C. C. COLE, } Judges.
" JAMES G. DAY, }

1. **Municipal Corporations — Destruction of Building to Prevent Spread of Fire — Liability of City for Acts of its Officers.** — Municipal corporations, whose officers are by statute and by ordinance authorized to order the destruction of any building or fence, "when they shall deem it necessary to arrest the progress of and extinguish" a fire, are not liable to the persons whose property is thus destroyed, in the absence of a statute creating such liability.

——. ——. **Eminent Domain.**—The destruction of buildings, etc., under such circumstances, is not a taking of private property for public use within the meaning of section 18 of article 1 of the constitution, but is a regulation of the right which individuals possess to destroy private property in cases of necessity, to prevent the spreading of fire or other great calamity.

——. ——. ——. The legislature cannot authorize the taking of private property for public use, except upon *first* making or securing just compensation therefor, and any statute professing to do so would be void, and confer no authority to that end.

On the 17th day of January, 1874, the plaintiff filed his petition, stating, in substance, that the defendant is a municipal corporation, organized under the laws of Iowa; that on the 4th day of July, 1872, there was a fire in progress within the limits of the city, and near the buildings of the plaintiff; that there was then in force an ordinance of the city, passed December 10th, 1868, entitled "An ordinance establishing and regulating a fire department," section 16 of which is as follows: "The engineer in command, or in the absence of the engineer, the mayor or any three trustees, may order any building, erection, or fence, torn down or blown up, where they shall deem it necessary to arrest the progress of, and extinguish the fire;" and section 20 of said ordinance is as follows: "Every person, not a fireman, who shall be present at a fire, shall be subject to and obedient to the orders of the chief and assistant engineers, the mayor and trustees, fire policeman, marshal and police contsables of the city, *provided*, said officers shall wear their respective badges of office, in extinguishing the fire, and the removal and protection of property, and in case such person shall refuse to obey such orders, he shall forfeit and pay a fine not to exceed five dollars for each offence, and all such officers shall have power to arrest any person or persons so refusing to obey such lawful orders as aforesaid, or suspected of stealing during the progress of the fire, and hold them in custody until after the fire is extinguished, and then to be dealt with according to law."

It is further alleged that at the time of said fire, "the engineer in command" of the fire department of the city was absent from the city, and that the said fire being in progress, the mayor then assuming in that behalf to act as the agent and official representative of the city, in virtue of his powers and duties as such officer and agent, and particularly in virtue of a pretended right and authority conferred upon and vested in him as such officer and agent by the sections of said ordinance above set out, for the pretended and alleged purpose of arresting the progress of and extinguishing said fire, did order the bystanders to tear down two certain buildings belonging to plaintiff, situated on lot one, in block 31, in the city and in the vicinity of the fire, which order was by them there obeyed, and said buildings torn down and destroyed; that there was no real necessity of tearing down either of said buildings, and that in giving said order the mayor acted carelessly, negligently and without sufficient cause; that if said buildings had not been torn down they would not have been burned by the said fire, nor was the fire either extinguished or arrested by tearing down said buildings, or either of them. The value of the buildings is alleged at seven hundred dollars, and that the plaintiff has demanded compensation therefor, from defendant, which was refused.

To this petition defendant filed a demurrer, which being sustained, and the plaintiff refusing to amend, judgment was rendered for defendant. Plaintiff appeals.

Gatch, Wright & Runnels, for appellant; *C. P. Holmes*, for appellee.

MILLER, C. J.—I. That any person may "raze houses to the ground to prevent the spreading of a conflagration," without incurring any liability for the loss to the owner of the houses destroyed, is a doctrine well established in the common law. The maxim of the law is, that "a private mischief is to be endured rather than a public inconvenience." 2 Kent's Com. 338. Lord Coke Says: "For the commonwealth, a man shall suffer damage; as for the saving of a city or town, a house shall be plucked down if the next be on fire. This every man may do, without being liable to an action." Mouse's Case, 12 Coke, 63; Id. 13. In Republica v. Sparhawk, 1 Dall. (Pa.), McKean, Chief Justice, says: "Of this principle, there are many striking illustrations. If a road be out of repair, a passenger may lawfully go through a private enclosure. So, if a man is assaulted, he may fly through another's close. In time of war, bulwarks may be built on private ground. * * * Houses may be razed to prevent the spread of fire, because of the public good." In Dillon on Municipal corporations, § 756, the learned author states the common law doctrine as clearly and succinctly as it is anywhere to be found. He says: "The rights of private property, sacred as the law regards them, are yet subordinate to the higher demands of the public welfare. *Salus populi suprema est lex*. Upon this principle, *in cases of imminent and urgent public necessity, any individual or municipal officer may raze or demolish houses and other combustible structures* in a city or compact town, to prevent the spread of an extensive coflagration. This he may do independently of statute, and without responsibility to the owner for the damages he thereby sustains." The ground of exemption from liability in such cases is that of *necessity*, and if property be destroyed, in such cases, without any apparent and reasonable necessity, the doers of the act will be held responsible. In support of this doctrine, see Governor and Company of, etc., v. Meredith, 4 Term R. 794, 797; Taylor v. Plymouth, 8 Met. 462, 465; Mayor, etc., of N. Y. v. Ford, 18 Wend. 126, 132, 133; same case, 17 Id. 285; Dunbar v. Alcalde, etc., of San Francisco, 1 Cal. 355; Surocco v. Geary, 3 Id. 69; Conwell v. Emprie, *et al.* 2 Ind. (Cart.) R. 35; American Print Works v. Lawrence, 3 Zabriskie, 590, 609, 610; same case, 1 Ibid, 248; McDonald v. City Red Wing, 13 Minn. 38.

The plaintiff does not, however, seek to recover against the mayor who directed, and the persons who assisted in, the destruction of his buildings, but he seeks to make the city liable on a principle of *respondeat superior*. It is claimed that the destruction of plaintiff's buildings was not necessary in order to extinguish or prevent the conflagration then in progress; that the act was, therefore, not justifiable at the common law, under the rule of necessity, and that since the city, by its ordinance, had authorized the mayor to judge of the emergency, and direct the destruction of the buildings, an act which any individual might do at his peril without any statute, it thereby made the act that of the corporation.

Of course, unless the corporation had authority conferred upon it by the statute defining its powers, to destroy buildings or other property, for the purpose of arresting the progress of a fire, or the power conferred upon it to pass the ordinance set out in the petition, it could not exercise such power, and would not be liable for the acts of its officers which it had no power to authorize. Dunbar v. The Alcalde, etc., of San Francisco, 1 Cal. 355, and cases cited; see also, The City of Burlington v. Kellar, 18 Iowa, 59; Clark v. City of Des Moines, 19 Iowa, 198; Clarke, Dodge & Co. v. The City of Davenport, 14 Id. 494; Taylor v District Tp. of Wayne, 25 Id. 447.

Municipal corporations, or certain officers thereof, are often appointed by statute, or by ordinance authorized by charter or statute, to judge of the emergency and direct the destruction of buildings and other property to prevent the spread of fire; and such corporations are frequently, by their charters or by some statute, made liable for damages which property owners may sustain by reason of their buildings or property being thus destroyed to prevent the extension of fires. But the liability of the city or town in such cases is held to be purely statutory, and unless the statute clearly makes the corporation liable to make compensation, it is not liable at all. In White v. The City Council of Charleston, 2 Hill (South Car.) 571, which in its facts is essentially like the case before us, the city council acting under the general municipal powers of the city, and without any express statute creating a liability, adopted an ordinance authorizing the intendant, among other officers, in time of fire to demolish such buildings "as may be judged neccessary" by him to arrest the spreading of the fire, thereby investing the officer with the power to judge whether the necessity existed or not. A fire being in progress, the plaintiff's house was blown up by order of the intendant, and the fire was subsequently extingushed before it reached the house destroyed. In an action of trespass by the owner against the city, it was held that, the city being a public corporation, it was not liable to an action by individuals, unless it be given by statute. Judge Dillon, in a note to section 758 of his work on Municipal Corporations, says of this case, that "the result was right, but assuming the power to pass the ordinance, the decision should be placed, we think, upon the ground that the intendant was discharging a *public*, as distinguished from a *municipal* or *corporate* duty, and is not in this matter to be regarded as the agent of the city, and therefore the city would not, on the principle of *respondeat superior*, be responsible for his acts." We will not stop to determine which is the true basis on which to rest the decision, for upon either ground the result is the same, that the city is not liable.

In Fisher v. The City of Boston, 104 Mass. 87, which was an action to recover damages for personal injuries to the plaintiff, caused by the alleged negligence of the officers and members of the fire department in performing their duties in putting out the fire in the city, it was held that the corporation was not liable, although the fire department was established and regulated under a special statute, which by its terms required acceptance by the city council before it took effect. It was said by Gray, J., in delivering the opinion of the court, that "the extinguishment of fires is not for the immediate advantage of the town in its corporate capacity," and it was held that in the absence of an express statute, municipal corporations are not liable for injuries occasioned by reason of negligence in *using* or keeping in repair the fire engines of the city.

It is further held, in the same case, that it makes no difference whether the legislature itself prescribes the duty of the officers charged with the repair and management of fire engines, or delegates to the city or town the power to define those duties by ordinance or by law.

In McDonald v. The City of Red Wing, 13 Minn. 38, it was held that a city is not liable for the destruction of a building torn down to arrest the progress of a fire, unless such liability is created by statute; and that it makes no difference whether such building is torn down under the direction of the city officers assuming to act in their official capacity, or by the citizens and by-standers on their own motion.

In Wheeler v. The City of Cincinnati, 19 Ohio State, 19, the Supreme Court of Ohio said, that "the laws of this state have conferred upon its municipal corporations power to establish and organize fire companies, procure engines and other instruments necessary to extinguish fire and preserve the buildings and property within its limits from conflagration, and to prescribe such by-laws and regulations for the government of said companies as may be deemed expedient. But the powers thus conferred are in their nature legislative and governmental; the extent and manner of their exercise, within the sphere prescribed by statute, are necessarily to

be determined by the judgment and discretion of the proper municipal authorities, and for any defect in the execution of such powers, the corporation cannot be held liable to individuals, *nor is it liable for a neglect of duty on the part* of fire companies, or their officers, charged with the duty of extinguishing fires."

In Western College, etc. v. The City of Cleveland, 12 Ohio St. 375, which was an action against the city to recover for property destroyed by a mob, based upon a clause of the city charter in reference to the city council, which provided that "it shall be their duty to regulate the police of the city, preserve the peace, prevent disturbances and disorderly assemblages," it was held that the duty intended was that properly appertaining to an administrative and legislative body acting in the government of the city—the making regulations, by-laws and ordinances for the purposes specified, to be enforced by the appointment of officers; and that neither on general principles, nor from the effect of the enactment, was the city responsible for the destruction of property by a riotous assemblage of persons, *or for* the neglect of the officers in not preserving the peace and preventing the destruction of property.

In Dunbar v. The Alcalde, etc., of San Francisco, 1 Cal. 355, it was held that a municipal corporation is not liable for the destruction of a building in pursuance of the direction of its officers, *where no statute exists creating such liability.* This decision was made in a case where the building of plaintiff had been blown up by the alcalde and other officers of the city during a conflagration, for the purpose of staying its progress, and where the destruction of the building by fire was not inevitable.

In Russell v. The Mayor, etc., of New York, 2 Denio, 461, the statute provided "that when any building or buildings in the city of New York shall be on fire, it shall be lawful for the Mayor, or in his absence, the recorder of the city, with the consent and concurrence of any two aldermen thereof, or for any three aldermen, to direct and order the same or any other buildings *which they may deem* hazardous and likely to take fire, or to convey the fire to other buildings, to be pulled down and destroyed." The statute also provided for an assessment of the damages which the owners of buildings thus destroyed should sustain, and for the payment thereof by the city, and it was held that the city was not liable, in an action at common law, for the loss of personal property deposited in a building destroyed by virtue of an order of the mayor, etc., pursuant to the statute to prevent the spread of fire; that the statute provided for compensation only to the owners of buildings thus destroyed, and to those "having an estate or interest" in such buildings; that the owner of personal property deposited in, and destroyed with the buildings, was not within the statute, and could not, therefore, recover. It was further held in that case, that the authority conferred by the statute upon the officers of the city, is a regulation of the right which individuals possess to destroy private property in cases of inevitable necessity, to prevent the spreading of fire; that in making an order for the destruction of a building, pursuant to the statute, the officers do not act as the agents of the corporation, but as magistrates designated by law for the execution of a public duty, and that the corporation was not responsible for their acts any further than the statute had made them so.

In Stone v. The Mayor, etc., of New York, 25 Wend. 156, it was held that the lessee of a building in the city of New York, destroyed by firemen, by order of the mayor, to prevent the spread of a conflagration, was *not* entitled to recover damages for merchandise in the building at the time of its destruction not belonging to him, but *the property of others*, and which was in his possession as a factor or merely on storage. The ground of this decision, like that in Russell v. The Mayor, etc., *supra*, is that there was no liability on the part of the city to make compensation for the property destroyed, except as, and to the extent, provided by the statute; that unless the statute created a liability on the part of the city, none existed. This is the doctrine of all the cases we have found, with the single exception of Bishop & Parsons v. The Mayor, etc., of Macon, 7 Geo. 200. There the city was held liable for blowing up the building of the plaintiff. No authority is cited except Lord v. The Mayor, etc., of N. Y., 18 Wend. 126. This case was decided both in the supreme court, 17 Wend. 285, and in the court of errors, upon the ground that the statute of the state had expressly made the corporation responsible, and not upon the ground of any common law liability. The decision stands alone, and in the language of the Supreme Court of California, in Dunbar v. San Francisco, 3 Cal. 358, "without some provision in the charter, or some statutory enactment imposing the liability upon the city, I do not see how that decision can be sustained."

In Taylor v. Plymouth, 8 Met. (Mass.), 462, which was an action to recover, against the town, for a building torn down to stop a fire, C. J. Shaw says: "In order to charge the town, the remedy being given by statute only, the case must be clearly within the statute. Independently of the statute, the pulling down of a building in a city or compact town, in time of fire, is justified upon the great doctrine of public safety, when necessary. * * * But if there be no necessity, then the individuals who do the act shall be responsible. This is the more reasonable, as the law has vested an authority in the proper officers to judge of that necessity. But the town is responsible by force of the statute only, and such responsibility is confined to the cases specially contemplated. In support of the same doctrine of the non-liability of the corporation in the absence of an express statute, see the following additional cases: Weightman v. Washington, 1 Black (U. S.), 49; Coffin v. The Inhabitants of Nantucket, 5 Cush. 269; Hafford v. City of New Bedford, 16 Gray, 297; Ruggles v. Nantucket, 11 Cush. 433; Parsons v. Pettengill, 11 Allen, 511; Surocco v. Geary, 3 Cal. 69; Burnhyser v. Evansville, 29 Ind. 187. See also cases cited in notes to Sec. 773, of Dillon on Mun. Corp. p. 732; and see also Ogg v. City of Lansing, Dec. term, 1872, 7 Western Jurist, 56, which was an action brought by the plaintiff against the city, alleging that in November, 1871, a man by the name of Sess was taken sick with small-pox in the city; that the city authorities took said Sess, and the house in which he was confined, under its charge and control, but neglected to take proper and ordinary precautions to prevent the spread of the disease; that Sess died; and the agents and servants of the city requested and directed the plaintiff, who was passing the house in which Sees died, to assist in taking the coffin, in which said deceased was deposited, from the house, without giving plaintiff any notice of the disease which caused the death, and without having cleansed the house or used any means to prevent the spread of said disease; that the plaintiff did so assist in removing said corpse, and soon returned to his own house, whereby the disease was communicated to two of his children, who died thereof. It was held that, although the statute conferred the power upon the city to establish a board of health, who had power to make regulations in relation to communication with houses when there was any contagious or infectious disease, to establish pest houses or hospitals, and when deemed expedient and necessary to prevent the spread of any contagious disease, to remove to the pest-house or hospital any person sick with any such disease, to prohibit communication or intercourse with such houses, etc., and to employ persons to carry into effect all the rules and regulations made by the board, etc., the city was not liable for the alleged negligent conduct of the persons thus employed in the hospital. It was held to be the "true doctrine that the powers conferred upon the corporation are of a legislative and governmental nature," for a defective execution of which the city could not be made liable in a common law action.

In the case before us, the statute (Rev. § 1057), authorizes municipal corporations to "protect the property of the municipal corporation and its inhabitants." Section 1058 empowers them to

make "regulations for the purpose of guarding against danger from accidents by fire." Section 1071 confers the power upon the city "to make and publish, from time to time, by-laws or ordinances, not inconsistent with the law of the state," for carrying into effect the powers conferred, and makes it the duty of the corporation "to make and publish such ordinances or by-laws as shall be necessary to secure the corporation from injuries by fire," etc. And by section 1096, the corporation is authorized to establish a city watch or police, and organize the same in such manner as will most effectually secure the inhabitants from personal violence and their property from fire and unlawful depredation, to establish and organize fire companies and provide them with proper engines and such other instruments as may be necessary to extinguish fire and preserve the inhabitants of the city from conflagration, and to provide such by-laws and regulations for the government of the same as they shall deem expedient."

We will not stop to determine whether these statutory provisions do or do not confer authority upon the city to pass the ordinance under which plaintiff's property was destroyed, for if they do not confer such authority, the city in its corporate capacity could not be made liable for the unauthorized act of any of its officers; the ordinance would be void, and would confer no authority on the mayor or other officers to do the act complained of, and the city would not be liable therefor. See Dunbar v. San Francisco, *supra*, and cases cited on p. 356. If, on the other hand, the ordinance is valid and authorized, the mayor to judge of the emergency and do, what, by the common law, any individual might do, at his peril, without a statute, upon cases cited, the city is not liable for the consequences of his acts in the absence of a statute creating such liability.

II. It is insisted by appellant's counsel, that the destruction of plaintiff's buildings, where there was no necessity to do so to arrest the progress of the fire, was a taking of private property for public use, and having been taken by appellee in pursuance of the ordinance and statutes referred to, the plaintiff is entitled to compensation from the city.

There are several satisfactory answers to this position: *First.* The power of eminent domain is vested in the state, and can be exercised by it alone, either directly or by the corporation or persons to whom it is delegated by the legislature; the purpose must be a public one and specified in the act delegating the power, and the power must be strictly pursued. See cases cited in notes to sections 467, 468 and 469, of Dillon on Municipal Corporations. There is nothing in the statutes of the state conferring the power of eminent domain upon the cities of the state, except for the purpose of laying off, opening, widening, straightening, etc., streets, alleys, public grounds, wharves, landing places, and market places; revision sections 1064, 1065, 1066, 1067. These sections of the statute confer upon the corporations the right of eminent domain for these purposes, and make provision for compensation to the owners of property to be taken under the power. The power is not conferred for any other purpose, and consequently can only be exercised for the purposes authorized. *Second.* If it be conceded that the destruction of buildings at the discretion of the mayor or other officer of the city, when a fire is in progress, is a taking of private property for public use, then it is beyond question that the statutes and the ordinance of the city, before referred to, do not confer any authority upon the city or any of its officers or other person to so destroy buildings or other property, and even if the statute, in express words, professed to authorize such destruction when deemed necessary by an officer of the city, no authority to do so would be thereby conferred. The statute would be null and void, because in direct conflict with section 18 of article 1 of the constitution. Any statute professing to authorize the taking of private property for public use without *first* making, or securing to be made, a just compensation therefor, would be invalid and confer no power whatever to take such property. There is no provision in the statute of the state providing for making compensation for property destroyed in cities for the purpose of preventing the spread of fire, consequently, if such destruction be an exercise of the power of eminent domain, it follows conclusively, that such destruction is not authorized by the law. Not only so, but if the destruction of buildings or other property for the purpose of preventing the spread of fire in a city or town, under the direction of some officer of the corporation upon whom is conferred an authority to judge of the emergency, be a taking of private property for public use, within the meaning of the constitutional provision before referred to, then the legislature cannot authorize such destruction, for, by the constitution, compensation is required to be *first* made or secured, before the property can lawfully be taken, which would be utterly impracticable in cases of fire in compact cities.

Third. In addition to the reasons above given, the great weight of judicial authority holds that the destruction of property, under authority conferred by law upon officers of municipal corporations, is not an exercise of the power of eminent domain, but is a regulation of the right which individuals possess to destroy private property in cases of inevitable necessity to prevent the spreading of fire, or other great calamity. The following cases hold that the destruction of property, under such circumstances, is not the exercise of the right of eminent domain: Russell v. Mayor, etc., of N. Y., *supra;* The American Print Works v. Lawrence, 3 Zabriskie, 595, 615; McDonald v. City of Red Wing, 14 Minn. 38, 41, 42; Stone v. Mayor, etc., of N. Y., 25 Wend. 172, 173, opinion of Senator Verplank; Surocco v. Geary, 3 Cal. 69, 73, 74; Dunbar v. The Alcalde, etc., of San Francisco, *supra.* The following cases, while they do not expressly decide, they support the same doctrine: Taylor v. Plymouth, 8 Met. 462, 465; The Mayor, etc., of N. Y. v. Lord, 18 Wend. 126; Conwell v. Emrie, 2 Carter (Ind.), 35.

While there are to be found in the opinions of judges in some cases, expressions leading to a different view, we have found no case directly holding a doctrine different from that of the cases above cited on this point.

We find no authority, either in the adjudged cases or in legal principles, upon which to hold the municipal corporation liable for the act of the mayor in ordering the destruction of plaintiff's buildings. The judgment of the circuit court, in sustaining the demurrer to the plaintiff's petition, must be affirmed.—[*The Western Jurist.*

Bankrupt Act—Payment by Insolvent Husband of Premiums on Life Insurance Policies for Benefit of Wife.

IN RE BEAR & STEINBERG, BANKRUPTS.

In the District Court of the United States, for the Southern District of Mississippi.

Before Hon. R. A. HILL, District Judge.

1. **Legal Title to Life Insurance Policy.**—The legal title to a policy of insurance on the life of a husband, taken out by him for the benefit of his wife, is in the wife.

2. **Payment of Premiums.**—The value of the policy depends upon the premiums being paid as they fall due. The wife may pay them from her own means—or, they may be advanced by a friend, other than the husband.

3. ——. **When Husband may Advance Them.**—If reasonable in amount, as compared with his estate and liabilities, and if he is solvent at the time, the husband may advance them.

4. ——. ——. **Valid as to Subsequent Creditors.**—Advances by the husband, in that behalf, are certainly valid as to subsequent creditors.

5. **When Legal Title to Policy of Insurance is not Assignable by Husband.**—When so held by the wife, the legal title is not assignable by the husband, either at law or in equity.

6. Payment of Premiums by Insolvent Husband a Fraud upon Creditors.—Any payment of premiums made by a husband after he has become insolvent, is a fraud upon his creditors, whether so intended or not, and his assignee in bankruptcy may recover from the wife the amount so advanced, with interest, from the proceeds of policy when paid, the claim for which he may sell when it is ascertained, and the purchaser will acquire the contingent right to it.

7. Procedure in Bankruptcy—Register to take Proofs, Sell, etc.—The register in bankruptcy is ordered to take proof of amounts paid by the bankrupts, if any, after they become insolvent, and out of what fund, individual or partnership; which claim, when ascertained, the assignee shall sell for cash, in like manner as other debts, or *choses in action* are sold.

Harris & George, solicitors for creditors; *Wharton & Johnstons*, for bankrupts.

HILL, J.—This case is now submitted upon the exception of the creditors to the schedules of the bankrupt, upon the ground that they do not contain, and the bankrupts have not surrendered therein, a life policy taken out by each for the benefit of his wife. The question, upon examination, I find one of no little difficulty, and have postponed its decision for the purpose of obtaining all the light on the question attainable; but as it may be important to the parties in interest to have it settled without further postponement, I proceed to its examination. It is admitted that the policies are upon the lives of the husbands for the benefit of their wives; this being so, the question is, to whom do they belong? I am inclined to the opinion that the legal title is in the wife, and not the husband. The value of the policy depends upon the payment of the premiums as they fall due. This may be done by the wife out of her own means, or may be advanced by a friend other than her husband; if advanced by the husband it is but an advancement, settlement, or provision made by him for her benefit, out of his estate, which if solvent at the time the advance was made, he could do without any violation of the rights of creditors; provided it was reasonable in amount when considered in connection with his estate and liabilities; and certainly would be valid as to subsequent creditors; indeed a suitable provision for one's household is not only not condemned, but sanctioned by law, both human and divine. I am of opinion that the title to a life policy of the kind mentioned, both legal and equitable, is in the wife, and cannot be controlled or assigned by the husband.

It is otherwise, when taken out by him for his own benefit, or for the benefit of his estate, as in the case of Catchings v. Manlove, 39 Miss. 655, cited by creditor's counsel; hence the necessity of the assignment to his wife and children in that case, which being made when the husband was insolvent, was properly declared void as against his creditors, but was valid as against other parties.

Whilst I am satisfied the policies in the case now submitted belong to the wives of the bankrupts, and are not subject to be surrendered by the bankrupts, yet any payments which they may have made out of either their individual or partnership effects after they became insolvent, was a fraud, whether so intended or not, so far as to entitle the assignee to recover from the wife the amount advanced, with interest, out of the policy when it shall have been paid, and this claim, when ascertained, may be sold by the assignee, and will pass the contingent right to the purchaser. The case of Erben, referred to by counsel, was a claim upon the part of the bankrupt for whatever interest he had in the policy to be set off as exempt under the statute of Pennsylvania, which was allowed, which, if it was property in the sense of the statute, was properly set off, and did not raise the question as between the creditors and right of the wife, and is not authority upon the question now presented.

The other cases referred to by the distinguished and able counsel of the creditors will be found when closely examined, I am of opinion, not in conflict with the conclusion above stated. The register will take proof as to the amount paid by the bankrupts, if any, after they became insolvent, and out of what fund paid, which claim, when ascertained, will be sold for cash by the assignee, as provided for the sale of other debts or choses in action.

Divorce—Denial of Matrimonial Intercourse.

STEELE v. STEELE.

Supreme Court of the District of Columbia, General Term, April, 1874.

A husband cannot maintain a suit for divorce, solely on the ground that his wife has denied matrimonial intercourse to him.

The plaintiff filed a bill in this case for a divorce from the defendant, his wife, on the ground of desertion. The desertion complained of, is that the defendant withdrew from his bed, and denied him matrimonial or sexual intercourse; that he continued to remain in the same house with the defendant for a considerable time thereafter, and then removal to another house, whither the defendant did not go; that subsequently the complainant requested the defendant, through a friend, "to live with him again as his wife," and she replied that "he could come and live in the house, but she would not live with him as his wife, *i. e.*, she would have no matrimonial intercourse with him."

The bill prayed for divorce *a vinculo matrimonii*, on the ground of desertion.

The proofs established that the complainant and defendant were lawfully married in September, 1865, and that there were —— children from the marriage, and that the defendant had assigned, as a reason for denying matrimonial intercourse to the complainant, that she did not desire to have any more children.

The case was submitted upon bill and testimony to the Court below, and a decree was made dismissing the bill. The case is now here on an appeal from that decree.

W. P. Peirce, for complainant, made the following points:

The plaintiff maintains that he is entitled to a divorce from the bonds of matrimony, under an act of Congress, approved June 1, 1870, and asks that the decree dismissing the bill be reversed on the following grounds:

1. That the withdrawal of the defendant from the matrimonial bed of the plaintiff, for the uninterrupted space of two years, was desertion within the meaning of the statute.

See Bishop, Mar. & Div., 3d Ed., Sections 506, 510; Browning Laws, Mar. Div., page 113, &c.

2. That the removal of the plaintiff from the house in which they were domiciled, being the natural and intentional result of the defendant's conduct towards him, constitutes desertion on the part of the defendant.

See Hodges v. Hodges, 1 Esp. 441; Camp v. Camp, 18 Texas, 528; Greenl. Ev., Sec. 18, &c.; Bishop Mar. & Div., 3d Ed., Sections 517, 525; Schouler's Dom. Rel., 1st ed. 54.

3. That the subsequent refusal of the defendant to domicile with the plaintiff "as his wife," and also the fact that she now remains in a sepaate domicile, the result of no wrong on the part of the plaintiff, constitutes desertion on the part of the defendant.

See Bishop Mar. & Div., 3d Ed., Sections 728, 514; Kent's Com., 8th edition, 2d volume, 174.

No appearance for defendant.

The Court were of opinion that the statute in regard to divorce did not confer authority upon the Court to decree a dissolution of the bonds of matrimony, on the grounds set up in this case.

The Chief Justice, while concurring in the judgment, expressed the opinion that a denial of the marital right of intercourse, when continued for a period of two years, should be regarded as a desertion within the meaning of the statute, unless such denial was made in consequence of inability from sickness, or other sufficient cause in good faith.

Order appealed from affirmed.

—[*Washington Law Reporter.*

—THE compulsory school law in New Hampshire seems to be working well. The percentage of non attendants upon schools is gradually decreasing.

Relative Importance of Case-Law.

[Continued from page 572.]

Coming next to the considered decisions of judges sitting in *banc*, or in courts of first instance in chancery, we find that the principles regulating the authority of such decisions are well settled. An erratic judge will sometimes overleap the bounds imposed by the comity of courts of co-ordinate jurisdiction, and run amuck against the decisions of other judges of equal authority. But apart from this, it may be laid down as one of the rules observed by all judges of first instance, that the latest decision upon a litigated question, is the one followed in subsequent cases involving the same point. The language of Martin, B., in Reg. v. Robinson, L. R., 1 C. C. 80, indicates this general principle. He observes as follows: "When a point has once been distinctly raised and decided in a reported case, I, for my part, regret to find such a question criticised and disputed over again. When a point has once been clearly decided, I think it is far better to acquiesce in the decision, unless it can be brought for review before a higher court." And this submission to a prior decision will, in ordinary cases, be observed, even though the judge deciding the latter case does not approve of the case he follows, as was done by Lord Selborne, sitting for the Master of the Rolls, in Pike v. Dickinson, 21 W. R. 862.

If, however, the latest decision is at variance with earlier cases, and they are not cited or considered therein, then it very much affects the value of such a decision. Earlier conflicting decisions being thus overlooked, the judges have generally felt themselves at liberty to disregard the later cases, if such earlier ones are more numerous or more satisfactory to their minds. Thus, in Gillan v. Taylor, 21 W. R. 823 (a case of charitable gift), Wickens, V. C., remarks: "I have unwillingly come to the conclusion that I am bound by the case of the Attorney-General v. Price, 17 N. S. 371, and Isaac v. Dr. Friez, Ambl. 575. It is remarkable that those cases were not considered by Vice-Chancellor Wigram, in Lily v. Hey, 1 Hare, 580, and of course one must treat Vice-Chancellor Wigram's decision with the greatest respect. If the Attorney-General v. Price, and the other cases I have mentioned, had been before Vice-Chancellor Wigram, in Lily v. Hey, I should have followed the more recent decision. As it is, I am not entitled to dissent from authorities so much in point." See also for an application of the same holding, Coote v. Whittington, 21 W. R. 837, and Rowsell v. Morris, 22 W. R. 67, where Sir George Jessel, M. R., refused to follow Coote v. Whittington.

Malins, V. C., may not unfairly be classed as one of the erratic judges above alluded to. He deals with the question we are considering in his own peculiar style, as reported in Ferrier v. Jay, 23 L. T. N. S. 302. "This point," he says, "has been before two learned judges, whose decisions are in direct opposition to one another. On the bulk of the authorities, I am bound to follow the latter of the two decisions. Although all the authorities do not appear to have been cited in that case, I must assume that the Vice-Chancellor had them all in his mind when he made that decision."

Of the Irish Bench, Lord Justice Christian may be taken as one of the most illustrious types of the judicial Ishmaelite that the annals of the law can exhibit. His views upon this subject are given in *Re* Tottenham's Estate, Irish R. 3 Eq. 528: "When the decision of one court is cited to another of co-ordinate authority, the latter has a right to regard it in a critical, and even sceptical spirit; and while accepting the decision, to decline the reason of deciding, if a better one can be assigned. But I confess, I think that when an inferior court (I mean inferior in the sense of curial procedure) has before it the decision of its non-appellate tribunal, it is the duty to conform itself frankly and loyally to the reason of the decision, and not merely to its letter."

The decision of a co-ordinate branch of the court, or of a court of co-ordinate jurisdiction, will be followed till reversed on appeal, in order to avoid an unseemly conflict of decisions: Per James, V. C., in *Re* Times Assurance Co. 18 W. R. 404, and see also *Re* Hotchkiss' Trusts, L. R. 8 Eq. 643. In Boon v. Howard, 22 W. R. 541, Keating, J., is reported to say: "There is no positive rule which precludes the court from examining its previous decisions, though those are to be departed from only on the strongest grounds. The court ought to respect its own decisions and those of other courts."

In Owen v. London R. Company, 17 L. T. N. S. 210, Cockburn, C. J., held, that as the authorities were somewhat divided, the courts were entitled to exercise their own independent judgment on the question to be decided. In such a conflict of authority, the earlier decision was followed by Romily, M. R., in Hall v. Bushill, 12 Jur. N. S. 243. But in making a choice among conflicting decisions, the considerations which ought to influence the court are well expressed by Mr. Justice Jebb, in Loveland Coyne v. Bartley, Alc. & Nap. 308: "When the court is obliged to decide upon conflicting decisions, and one of them is of late date, of unquestionable authority, and is adopted by compilers and text and elementary writers of character, and is also in accordance with the opinions of the bar, so far as we can collect it from a series of authorities and precedents, we should not be warranted in making a decision contrary to that opinion."

[To be continued.]

—[*Canada Law Journal.*

[Correspondence.]

A New Solution of the Railroad Question.

EDITORS CENTRAL LAW JOURNAL:—I believe your courtesy will allow me space to reply to your answer to my strictures upon the "New solution of the railroad question." To a part of it I shall not attempt to reply, because it is evident that the chief difference between us is one of political rather than of municipal law, and a discussion of that difference would be burdensome to you and unprofitable to your readers. I would venture to suggest that you seem to be in favor of what is called a "liberal construction" of the constitution and of public law, and are opposed to what you style "nice legal barriers;" while I cannot help believe that such construction leads to the grossest injustice, and that "legal barriers" form the only safeguards of liberty and property. When ours ceases to be a government of law, with its legislatures as well at its courts controlled by written constitutions and old common law notions of private rights, which have prevailed for centuries, its usefulness will have departed.

It may be that an individual who builds a train of cars for traffic on a railroad, and has the tracks condemned for the use of his train in rivalry of and against the will of the owners of the road, will represent the public thereby, but the argument is not satisfactory to me. Still, I will not dispute it, and must admit that it is very ingeniously urged. But, when you make the negro boy who drove his team across some one's field, when the highway was out of order, represent the public, I humbly submit that you will call upon old Chancellor Kent in vain, if you seek to justify upon the right of "eminent domain." You say, "the first illustration of the right of eminent domain given by Chancellor Kent, is": "if a common highway be out of repair a passenger may lawfully go through an adjoining private enclosure." 2 Kent Com. 338. So he says, but he cites it as an illustration of a principle entirely different. In the note to this sentence, he adds: "So, an entry upon another's land may be justified in cases of overruling necessity, or to recover propererty carried on another's ground by the force of the elements." He styles these "the right of a public necessity." He adds: "These are cases of urgent necessity, but private property must in many other instances yield to the general interest. The right of eminent domain or inherent sovereign power gives to the legislature the control of private property for public use and for public use only." He then speaks of the need of compensation in such cases. The right of passage over adjacent land, when the highway is out of order, is as different from the right of eminent domain as that is from the right of police. The right of eminent domain requires compensation. The right of passage does not. In the one case you condemn the property by fixed legal proceedings. In the other you act at once without leave or license from anybody. You cross the field, and no matter what the injury, if it be unavoidable, it is *damnum absque injuria*. If your hat blows off and lodges in your neighbor's apple tree, you may get it without any compensation to him, and although it is the hat of an "individual" and not of the public. Your

house may be pulled down to prevent the spread of fire, but that is not an exercise of the right of eminent domain. It is the right of police or self-preservation, and no compensation follows at common law.

If the needs of the public are not answered by the existing railroads, you may condemn land for another, but I submit, with great deference, that by principles and charters as old as Runnymede, reiterated over and over again in England and in this country, you cannot take the road already built—and why?—simply because it is evident that the public need does not require it. You can build another alongside, and your ability to do that disproves your right to take this. I also deny that there is any principle under which the employees of a railroad could, in time of peace, be made to operate the train of a rival. The "police power" sometimes knocks down peaceable citizens, but it has never yet discovered any way to make them go to work *in invitum*, except in the chain gang.

The old chancellor was not unwilling to have a government which some of us would think too strong, but he had a just respect for the rights of property, and he said in the same chapter from which you quote, "It undoubtedly must rest, as a general rule, in the wisdom of the legislature to determine when public uses require the assumption of private property; but, if they should take it for a purpose not of a public nature * * or if they should vacate a grant of property or of a franchise under the pretext of some public use or service, such cases would be gross abuses of their discretion and fraudulent attacks on private rights, and the law would clearly be unconstitutional and void."

Chancellor Walworth, in 5 Paige, 159, eloquently vindicates the rights of the owners of property. From that and other cases which have been carefully considered by learned courts, it is evident that the use for which private property is to be taken must be really a public use, and that there must be some substantial need of taking the identical property sought. If the public could build another railroad on the desired route, or near it, such need would not exist and the proceedings would be in violation of law and void.

I fear I am presumptious in opposing the views of the editors of the CENTRAL LAW JOURNAL, but the principles involved are important; some other people think as I do, and if we are running our train on the wrong track we ought to be switched off.

T. G.

DENVER, COL.

REMARKS.—1. After considering the subject more attentively than before, we do not see any reason to modify any of the views previously expressed by us on this question. Our correspondent lays much stress upon the fact that Chancellor Kent, in using the illustration of the passenger going over the land of the private owner, when the highway was out of repair (2 Kent Com. 338), was illustrating "the rights of public necessity," and not the inherent sovereign right of eminent domain. We continue to think that there is no substantial difference between the "rights of public necessity," so far as concerns the assumption of private property for public purposes and the right of eminent domain. For the latter right is founded upon public necessity or public convenience, and is not, as its name would indicate, an ultimate right of property in the sovereign, but merely the *right of appropriating* private property for the public purposes, whenever an exigency shall arise demanding it. Bynk. Quæst. Jur. Pub. lib. 2, c. 15; Heinec. El. Jur. et Nat. lib. 2, c. 8, s. 168, n; Vattel, c. 20, § 34. The name itself (*dominum eminens*) was an invention of Grotius; but the principles on which the right rests were understood long before his time, and were understood (though, perhaps, imperfectly) by the early writers and judges of the common law, who, however, do not designate it by this name. It is believed that the word eminent domain cannot be found in the text of Blackstone's Commentaries, and the writer does not remember to have seen it in any of the earlier judgments of the English courts which Mr. Broom has collected to illustrate the doctrine that private right must yield to public necessity, under the maxim *salus populi suprema lex*. Broom Leg. Max. 1. Nor do we perceive any force in the position taken by our correspondent, that in the case of the use or destruction, by the public, of private property, through necessity, as in case of a highway out of repair, or property destroyed to prevent the spread of fires, compensation need not be made; whereas the exercise of the right of eminent domain must always be attended with compensation to the private owner. For, while we admit that this distinction is taken in some cases, and notably in one which we elsewhere print in this number, yet we do not perceive how our correspondent's argument derives any advantage from it. For the "public necessity," which will justify the taking of private property without compensation, clearly will justify such taking when adequate compensation is made.

2. Our correspondent submits, that while we may condemn land for another road, yet by principles and charters as old as Runnymede, reiterated over and over again in England and in this country, we cannot take the road already built, and simply because it is evident that the public good does not require it. "You can build another alongside," he adds, "and your ability to do that disproves your right to take this." We think this proposition carries within itself a direct contradiction. If "the public good does not require it," how can you condemn the lands of private owners to build a new road parallel with one already built? If the railroad corporation can say "you cannot take our road because you can build another," the land-owner can say, with equal force, "you cannot take my land to build a new road, because there is a road already built; go and take that." The rights of the adjacent land-owner and of the railroad-owner being, then, equal, considerations of public economy and convenience, and the generally conceded fact that it is against sound policy for governments to engage in the work of building vast internal improvements, when it can be avoided, would intervene and turn the scale in favor of taking the property of the railroad-owner. And this would be far better for him; for, through the payment of tolls from private train-owners, he would acquire an adequate and continuing compensation for the use of his property; whereas, a railroad owned and operated by the government, parallel to his, would result in a practical confiscation of his invested capital. In the face of such a powerful competitor, with the public treasury at its back, and not burdened by a bonded debt, he could not subsist—certainly he could not pay dividends on watered stock representing four or five times the cost of his railroad property.

3. We presume our correspondent does not mean to hint that the franchise of a private corporation may not be taken for public uses though the exercise of the right of eminent domain, as well as the property of private persons. If he does, we beg to refer him to the following cases: Piscataqua Bridge Co. v. New Hampshire Bridge Co., 7 N. H. 35; Crosby v. Hanover, 36 N. H. 420; Boston Water Power Co. v. Boston and Worcester R. R. Co., 23 Pick. 360; Central Bridge Corporation v. Lowell, 4 Gray, 474; West River Bridge v. Dix, 6 How. 507; Richmond R. R. Co. v. Louisa R. R. Co., 13 How. 81 (Grier, J.); Chesapeake and Ohio Canal Co. v. Baltimore and Ohio R. R. Co., 4 Gill & J. 1; State v. Noyes, 47 Me. 189; Red River Bridge Co. v. Clarksville, 1 Sneed, 176; Armington v. Barnet, 15 Vt. 745; White River Turnpike Co. v. Vermont Central R. R. Co., 21 Vt. 594; Newcastle, etc., R. R. Co. v. Peru, etc., R. R. Co., 3 Ind. 464; Springfield v. Connecticut River R. R. Co., 4 Cush. 63; Forward v. Hampshire, etc., Canal Co., 22 Pick. 462.

4. This being the undoubted law, it remains to enquire who shall judge (1) whether the *use* for which the property of the railroad-owner is sought to be condemned, is a public use; and (2) whether the *public necessity* justifies the taking.

(1.) Upon the first point we are willing to concede that there may be cases in which the courts may properly interfere, and declare, that the *use* for which the legislature has authorized property to be taken, is not a *public use*. Bankhead v. Brown, 25 Ill. 540; Olmstead v. Camp, 33 Conn. 531; Tyler v. Beacher, 44 Vt. 648; Loughbridge v. Harris, 42 Ga. 500. We freely concede that the courts will not permit the property of one man to be taken from him and given to another, under a mere pretext of benefiting the public, although adequate compensation be paid. Cooley Const. Lim., 531; Currier v. Marietta, etc., R. R Co., 11 Ohio State, 228; Gilmer v. Lime Point, 13 Cal. 306; Brunning v. N. O. etc., Co., 12 La. An. 541; Harding v. Goodlett, 3 Yerg., 41; Memphis Freight Co. v. Mayor, etc., 4 Coldw. 417; Clack v. White, 2 Swan, 549.

(2.) But the general proposition, nevertheless, remains true, that the question, whether there is a necessity which will authorize the taking, is a *political* and not a *judicial* question. The old chancellor was not far out of the way, when he said, "if the public interest can in any way be promoted by the taking of private property, it must rest *in the wisdom of the legislature* to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain, and to authorize an interference with the rights of private individuals for that purpose." As was said by Denio, J., in People v. Smith, 21 N. Y. 597, "the necessity for the taking of private property for the use of the public, or of the government, is not a judicial question. The power resides in the legislature." "The authority to determine, in any case, whether it is needful to exercise this power," says a living writer of even higher authority on this subject than Chancellor Kent, "must rest with the state itself; and the question is always one of a strictly political character, not requiring any hearing on the facts or any judicial determination. * * On general principles, the final decision rests with the legislative department of the state; and if the question is referred to any tribunal for trial, the reference and the opportunity of being heard are matters of favor and not of right." Cooley Const. Lim. 538. In support of these views the learned author cites People v. Smith, *supra;* Ford v. Chicago and N. W. R. R. Co., 14 Wis., 617; Matter of Albany St., 11 Wend. 152; Lyon v. Jerome, 26 Wend., 484; Hays v. Risher, 32 Penn. St. 169; North. Mo. R. R. Co. v. Lackland, 25 Mo. 515; Same v. Gott, Ibid., 540. In view of these authorities we apprehend that if the national, or a state legislature, should declare it a public necessity to condemn the property of a railroad-

owner so as to make it a common highway for the benefit of the public, instead of the means whereby a few individuals perpetrate upon that public an outrageous and systematic extortion, no judicial tribunal would have the hardihood to say no.

5. We did not assert, nor intend to assert, that there is any principle by which the employees of a railroad company can, in time of peace, be made to operate the road of a rival. We did and do assert that it is a familiar principle that the paramount authority of the government extends to the commanding, when necessary, of the *services* as well as the property of its citizens. If our correspondent is not familiar with this principle, he must freshen up on the elementary writers. "His property, liberty and life shall," says Mr. Broom, "under certain circumstances, be placed in jeopardy, or even sacrificed, for the public good." But the necessity which will command, *in invitum*, the services of a citizen, must generally be a great public necessity, such as war, a great conflagration, flood or other public disaster. A familiar illustration in time of peace of this principle, is believed to be found in those laws which compel all able-bodied citizens, within certain ages, to work on the public roads, or other citizens with certain qualifications to serve on juries. And in England no qualified person could refuse the office of sheriff, on a similar principle; and this is the law in Tennessee to this day, although since the office has become lucrative, it is a dead letter. But this principle is obviously one which ought not to be extended in time of peace; and we do not think, and never have thought, that it could be extended so as to press into the service of a rival corporation, *nolens volens*, the employees of another. Nor would this be at all necesssary. Voluntary agents without number would present themselves as soon as adequate compensation was insured. Nor would it be necessary that these agents should be officers of the government, or paid out of the public treasury. The pilot who conducts an ocean steamer into New York harbor is paid by the vessel's owner or master; yet his conduct is strictly controlled by regulations established by Congress, designed to prevent collisions and preserve the lives of those who "go down to the sea in ships."

Notes and Queries.

CONFUSION OF MATERIALS—REPLEVIN

I. NEBRASKA CITY, NEB., Nov. 16, 1874.

EDITORS CENTRAL LAW JOURNAL:—I have for you or your readers a legal conundrum. B. purchased of A., who is a lumber merchant, a bill of lumber, and gave his promissory note therefor containing a clause "that the title to said lumber should not pass" from A. until payment of the note, but should remain in A. B. builds a house with said lumber, adding of course, nails and plastering upon the lands of C. with C.'s permission. The house is of course personal property, but can A. replevy the same, or proceed otherwise against it *in rem?* An answer with authorities is requested. E. F. W.

ANSWER.—There is a difference between articles which do not lose their identity, and lumber, brick, &c., which do lose their identity on being incorporated into a building. This principle is discussed in some of the cases relating to *fixtures*. Clearly in the case supposed, replevin cannot be maintained, and the right to enforce a lien in chancery is, to say the least, doubtful, but it is difficult to define in advance the conditions of equitable interference.

II. LARCENY—STATUTE.

WINCHESTER, ILL.

In Illinois, larceny is, by statute, *defined* to be "the felonious stealing, taking and carrying, leading, riding, or driving away the personal goods of another." Rev. Stat. 1874, p. 377, § 167. By the same statute (p. 395, § 292), it is provided that "all offences herein *defined* shall be prosecuted, and on conviction, punished as by this act prescribed, *and not otherwise*." The same statute (p. 377, § 168) provides the punishment for larceny as follows: "If the property stolen *exceeds* the value of $15, [he] shall be imprisoned in the penitentiary not less than one nor more than ten years; if the value of the property stolen *is less* than $15, he shall be confined in the county jail not exceeding one year, and fined not exceeding $100."

What would be the punishment, or could a man be punished at all, if found guilty of stealing property worth *exactly* $15? JAS. M. RIGGS.

REMARKS.—We see no substantial difficulty in the above statute, but we invite the attention of our readers to it. If the value of the goods stolen were exactly fifteen dollars, and the prosecuting attorney had any doubt about the construction of the statute, he could draw the indictment so as to charge the felonious taking and carrying away of goods of the value of fourteen dollars and ninety-nine cents, and proof of the stealing of goods of the value of fifteen dollars would be no variance. But we apprehend that if the indictment charged the stealing of goods worth exactly fifteen dollars, and the proof showed that fifteen dollars was the exact value of the goods stolen, there would be no difficulty in the case; the court would construe the stealing of property of the exact value of fifteen dollars to fall within the clause which punishes the stealing of property of a *less* value than fifteen dollars; for the greater includes the less. To hold that under such a statute the thief who has stolen *exactly* fifteen dollars may go unpunished, would be a sticking in the bark of the statute worthy of the nonsensical subtleties of a hundred years ago, but disgraceful to any court of justice of the present day. We apprehend that a court which, under an indictment for murder, could see that it was possible for three men at the same instant to strike a fourth with the same club, would have no difficulty in expounding the above statute, in case a thief were convicted under it of stealing a five and a ten dollar greenback, so as to punish the thief and protect society.

Book Notice.

SEDGWICK ON STATUTORY AND CONSTITUTIONAL LAWS. 2d Edition, with numerous additional Notes by JOHN NORTON POMEROY, LL. D., New York: Baker, Voorhis & Co. 1874. pp. 692,

We are glad to welcome the second edition of this standard work. It has justly ranked, since its first appearance, as one of the best productions of American legal authors. No other single Treatise covers the exact ground occupied by it. Its object is to state and illustrate the Rules which govern the courts in the construction of Statutes and written Constitutions. When we consider how much of our law consists of positive or express provisions, constitutional or statutory, we at once realize the importance of a work on this subject. Indeed, no lawyer can afford to do without it. More than one half of Mr. Sedgwick's Treatise is devoted to statutes, and in this respect it treats from an American stand-point the same subjects so admirably considered in the excelent English work of Dwarris. In this respect its plan differs from that of the valuable treatise of Judge Cooley, on Constitutional Limitations. Strictly, only the last two chapters in Mr. Sedgwick is upon the same subjects to which Judge Cooley's work is devoted. The former work is the more elementary and philosophical; the latter the more intensely practical. The legal literature of America cannot afford to dispense with either, and we do not know, were we driven to the election, with which we would first consent to part.

One great charm of the work under reveiw, is the clear, elegant and flowing style in which it is written, In this respect it constantly reminds one of the first volume of Starkie on Evidence. In this respect, also, it is superior to the same author's work on the Measure of Damages. This is owing in part to the subject, but in a measure, also, we suspect to the circumstances under which it was written. We have heard that it was prepared by its author when left desolate by the loss of one deeply beloved, and to divert his mind from the pressure of his great grief. Accordingly, it is "Dedicated to the Memory of his Wife," and in his Preface he touchingly says "he takes leave of a task which has beguiled many hours of their weariness, and which has furnished a partial solace for the sadness of many others." In what an amiable light does this reveal the lamented author. It endears him to us.

The editor's work has been well and thoughtfully done. He leaves Mr. Sedgwick's text intact—and puts his own labors in the form of Notes, which bring the subject discussed down to date. The extent of the editor's additions is indicated by the fact that over 2,500 cases are cited in his notes, and yet the work is kept in manageable limits. Again we thank Messrs. Baker, Voorhis & Co., for their excellent edition of this valuable work.

Summary of our Exchanges.

The Albany Law Journal, for November 21, contains an article on survivorship between husband and wife, in which several New York cases are collected; also an extract from the address of David Dudley Field, before the New York Mercantile Library Association, on the Law and the Legal Profession; also an extract from the Solicitors' Journal, on Some Recent Decisions in Private International Law; also the opinion of an English county judge, from the London Law Journal, on Railway Unpunctuality; together with its usual abstract of New York decisions, notes on current topics, notes of cases, etc.

The Pittsburgh Legal Journal, for November 18, publishes several opinions of the Supreme Court of Pennsylvania. We note the following:

Schell *et al.* v. Stein: A deed regularly acknowledged or proved, and recorded in the proper book, and indexed in the separate index appropriated to the book, but not in the general index of all the deed books, is not defectively recorded.

Bell and Weir v. Reed: No one will be permitted so to excavate his land as to do a permanent injury to the land of his adjoiner, when such adjoiner's land is in its natural condition, or the injury thereto would result notwithstanding and without artificial pressure thereon.

The Chicago Legal News, for November 28, publishes an elaborate opinion of the Supreme Court of Illinois, by Mr. Justice McAllister, in Hewitt v. Long, which was a contest between a father and mother for the custody of their minor child. The nature of the case is thus explained by the editor of that journal: "Before the child was born, the father deserted the mother and went off to Iowa. She obtained a divorce on the ground of desertion, and a decree for the custody of the child, in the Cass County Circuit Court. The father married again in Iowa, and became rich. The child, Alice, being about fourteen years of age, the father, on petition, against the wishes of the child, had the decree so modified as to give him the custody of the child, and allow him to remove her to Iowa. The mother appealed. The court discusses the common law rights of fatherhood, the statutory and natural rights of the mother, and the rights of the child whom it was sought to take from the mother and remove to another state, against her will. It was said by the learned judge, in delivering the opinion, that Alice, having been born in this state, she owes natural allegiance and has certain independent personal rights. The laws and customs of this state are her birthright. It is by those laws and the circumstances of her parents that she became a ward of the court, and as such entitled to its protection and superintendence over her welfare, and that she cannot be removed from this state against her will. Breese, C. J., dissents from this opinion of the court, and delivers an elaborate opinion, in which Sheldon, J. concurs. We shall publish this opinion in our next."

In also publishes a decision of Mr. District Judge Blodgett in the case of Reed, a bankrupt, holding—

1. That a debt barred by the statute of limitations of the state where the bankrupt resides, cannot be proved in bankruptcy.

2. That less strictness of proof is required to establish a promise by the debtor *before* the bar of the statute has attached, than to prove a new promise *after* the debt has become barred.

Also an opinion of Mr. District Judge Morrill of the United States District Court for the Eastern District of Texas, holding, that inasmuch as the applicant for a discharge in the case before him was a voluntary bankrupt, and has not assets equal to thirty per centum of the claims proved against his estate, upon which he was liable as principal debtor, and has not obtained the consent of one-fourth of his creditors in number and one-third in value, his application for a discharge must be refused.

Also an opinion of the Supreme Court of South Carolina, by Moses, Ch. J., holding that the city of Charleston has power to tax its own stock (whatever that is), and that it can tax its stock held by non-residents.

The Legal Intelligencer, for November 27, contains but two or three cases of the general interest. In Morse v. Worrell, Common Pleas of Philadelphia, before Paxson, J., it appeared that the plaintiff's trade-mark was "The Rising Sun Stove Polish," with vignette of the sun. Held, that defendants would no be restrained from using the words "Rising Moon," with vignette of the moon.

It publishes opinions of the Supreme Court of Pennsylvania in the following cases: Burke v. Hammond: 1. Abandonment of realty will be presumed unless some indication be left in, or upon the property, of intention to return.

2. A continuous claim for twenty-one years and payment of taxes, raises a presumption of a grant from the warrantee.

James P. Hanna, Survivor of Ira B. McVay, v, Robert Wray: 1. In a proceeding against a surviving partner on a partnership liability, the plaintiff is incompetent to testify to transactions and conversations between himself and the defendant's deceased partner.

2. A judgment against such surviving partner, unless fraudulent, would bind in settlement between himself and the estate of his deceased partner.

3. Karnes v. Tanner, 16 P. F. Smith, followed.

The Legal Gazette, for November 27, prints the opinion of Mr. Justice Strong of the Supreme Court of the United Statet (delivered November 9th) in the case of the ship Belle of the Sea v. Johnson & Higgins. The following is the syllabus:

The captain of the ship Belle of the Sea, executed a bottomry bond, payable within ten days after the safe arrival of the ship at New York. Upon her arrival, the mortgagee took her into possession, and employed the libellants to take up the bottomry bond, to collect the freight, general average and insurance, and generally to transact the business of the vessel. This arrangement was assented to by the owner any charterer. The bond passed by assignment into the hands of the libellants. As the sums collected proved to be insufficient to pay the expenses of discharging the ship, &c., it was claimed by the libellants that they had the right to apply what was collected, 1st, for their commissions, necessary expenses, and disbursements made by them on account of the ship; 2d, to the discharge of the bottomry bonds. It was contended that they had surrendered these rights by agreeing to pay the bond, and thus discharge its lien, looking to the freight, the general average, and the insurance alone for reimbursement.

1. *Held*, that the evidence did not establish the fact of any such surrender.

2. That the rights claimed by libellants belonged to them, and that the decision of the court below in affirming those rights be confirmed.

For a report of this case in the court below, see 4 Leg. Gaz. 108.

We see nothing else of interest in this number of the Legal Gazette, except matter which we have already noticed as being in other periodicals.

The following are the contents of the Psychological and Medico-Legal Journal for November:

ORIGINAL COMMUNICATIONS.—Mr. Wallace Wood, Mental Physiology; Dr. J. L. Teed, Study of Nervous Disease—second art.; Dr. James P. O'Dea, Philosophy of Suicide, Part 1—General cause (*continued*); Mr. George Chaoon, The Children's Aid Societies; M. Schafhausen, Pre-Historic Anthrophology and Ethnology.

PROCEEDINGS OF SOCIETIES.—New York Medico-Legal Society; Changes in Constitution and Election of Officers; Societe Medico-Psychologique of Paris; Discussion on the Frequency of Suicide.

CONTEMPORARY LITERATURE.—Flint's Essay on Conservative Medicine; Clay's Hand Book of Obstetric Surgery; Swan's Surgical Emergiences; Lindsay & Blakiston's visiting List; Montane's Crane chez les Microcephales; Sha Rocco's Masculine Cross; Cohen's Croup and Tracheotomy: Buzzard's Syphilitic Nervous Affections; Galezowski's Echelles Typographiques; Dr. Clifford Allbutt, Letter to the Editor.

The Albany Law Journal, for November 28, has an article by John Proffatt Esq., of the Liabilty of a Married Woman on Tort. It concludes the article of Mr. Wood the Lateral and Subjacent Support of Lands. It reprints from the Pall Mall Gazette an article on Damages for Breach of Promise, and has otherwise its usual amount of interesting matter.

Legal News and Notes.

—IN the last financial year the pensions for judicial services in Great Britain amounted to £58.681 3s. 3d., and in Ireland to £17,258 18s. 8d.

—THE Supreme Court of Massachusetts declares the divorce law of 1874 unconstitutional.

—FORTY-THREE life-insurance companies have been compelled to suspend business during the last five years in the United States.

—THE safe burglary trial at Washington has ended in the acquittal of Williams, and in the disagreement of the jury upon Whitley and Harrington, indicted as conspirators.

—THE newly elected members of the Supreme Court of Arkansas met on the 23d ultt., at Little Rock, in accordance with the provisions of the new constitution. The members drew lots for terms as follows: Chief-Justice English, 6 years; Associate-Justice Walker, 4 years; Associate-Justice Harrison, 4 years. Luke E. Barber was elected clerk and reporter of the decisions.

—PENSION OFFICE.—The commissioner of pensions has submitted his annual report to Secretary Delano. It gives a review of the business of the office up to include June last. It recommends that higher fees be paid examining surgeons, so that better talent can be commended. The amount of appropriation that will be required for the pension service during the fiscal year ending June 30, 1876, will be $30,500,000. The commissioner again calls the attention of the secretary of the interior to the danger of destruction by fire to which the records of the office are liable in consequence of the exposure of the Seaton House to such an accident. He urges Congress should be reminded of the great risk to which these valuable records are exposed, to the end that a more suitable building be provided for the use of the office.

—PUBLICATION OF UNITED STATES REVISED STATUTES.—The text of these revised statutes, including the table of contents by chapters and subjects, marginal references and citations, is now in print. The work on the index, under the directions of Judge C. W. Jaines, is advancing as rapidly as possible, consistent with the degree of accuracy which is sought. This cannot be finished before January. Meantime it is proposed to furnish the courts, and many of the principal officers of the Government, with copies without an index, and the distribution of these incomplete volumes can begin at once. The index will be the most complete of any ever prepared by the government. It will cover 400 pages, and contain about 20,000 entries. The revised statutes contain 5,600 sections, and the minimum numbers of references in the index to each section is three, while in other instances they run as high as eighteen references to a section of fourteen lines. The index to Edmund's New York statutes contains about 32.000 entries.—[*Daily Register*.

—A young bachelor who had been appointed Sheriff, was called upon to serve an attachment against a beautiful young widow. He accordingly called upon her and said: "Madam, I have an attachment for you." The widow blushed and said his attachment was reciprocated. "You don't understand me. you must proceed to court." "I know it is a leap year, sir, but I prefer you to do the courting." "Mrs. P. this is no time for trifling, the Justice is waiting." "The Justice! why, I prefer a parson."

—THE DENTISTS AND THEIR FALSE GUMS.—This morning arguments will commence in the United States Circuit Court, in the famous Goodyear dental vulcanite suit against the dentists. Judges Emmons, Longyear and Withey will sit. This suit is brought by the Goodyear Dental Vulcanite Company to recover royalty for the use of vulcanized rubber amounting to upward of $7,000,000. It is a test case, and Dr. George Willis is the nominal defendant, although the suit is practically defended by all the dentists in the United States, some 15,000 in number, under the auspices of the Dental Protective Uninn of Michigan, of which Dr. B. T. Spellman is president.—[*Detroit Free Press.*

CRIM. CON—EVIDENCE—COLOR OF CHILD'S HAIR.—A point was raised in Petrie v. Howe, 4 N. Y. Sup. 85, which reminds one of the celebrated case of The Alms House v. Whistlo. The action was crim. con. The plaintifft after testifying that his wife was the mother of four children by him, and that after the alleged criminal intercourse she gave birth to a fifth, was asked what was the color of the hair of the first four children. The fifth child was present in court. It was held that this species of physiological evidence was not admissible, and because it had been received, a new trial was granted.—[*Albany Law Journal.*

—WE have already had occasion to note the loose manner in which criminal justice is administered in Scotland, We had occasion to note a case in which a man of some rank, in attempting to shoot a farm laborer accidently killed a horse, and was let off with a slight fine and reprimand. An exchange says: "In the Highlands of Scotland almost every crime except murder is regarded with comparative indifference, and criminals when convicted, frequently have the option of leaving the place, never to return, rather than being sent to jail. In the Orkney and Shetland islands, also, when persons are convicted, they are sent across the Pentland Firth, to the mainland of Scotland, as a punishment, whereas the same class of criminals in England would be transported or sent to penitentiaries.

—RUFUS CHOATE'S OPINION OF A DISTINGUISHED DEMOCRAT.—Some twenty-five years ago, while Mr. George Ticknor Curtis was still exercising the functions of a United States Commissioner, in the rural city of Boston—before he had sent back a fugitive slave, and had thereupon immigrated to this more congenial metropolis—Mr. Rufus Choate left his law office early on a November morning, to pass the day in taking testimony before Mr. Curtis, in a patent case. Returning to the office late in the dusky, chilly afternoon, after finishing the task, Mr. Choate threw his bag upon the table, and remarked in the hearing of his law partner, Mr. Joseph Bell, and the half a dozen young law students, who were all aware what he had been doing: "I consider Mr. George Ticknor Curtis the most unsatisfactory man, upon the whole, that I have ever known, and I wish that I may never set my eyes upon him again." Then walking wearily across the room to the fire-place, he stood for a few moments warming himself, before a pile of sea-coal which was blazing in the grate. With the increasing warmth of his body, the usual sweetness of his disposition seemed at last to return, and after a long pause, he broke the silence by the remark: "I do not know but I might endure to look at him from a window in a procession."—[*From the Evening Post.*

—POST OFFICE.—The Postmaster-General has just issued the following new decision: After January 1, 1875, if a weekly and monthly publication be mailed together in one wrapper the postage must be prepaid at the higher rate for monthly publications, *i. e.*, three cents for each pound or fraction thereof. In reference to the proposition submitted by publishers of magazines asking permission to mail the January number of their respective issues in December, at the rates prescribed by the new law, the Postmaster-General decides that he has no authority in the matter, and that the January number can only be mailed in January, at the terms of the new law, or if mailed in December it must be subjected to prepayment at the office of mailing, or pay double transient rates at the office of delivery. The publishers will undoubtedly hold back the delivery of the January number until January. The use of sealed transparent envelopés for the transmission of matter of the third class is sanctioned by postal regulations. Under no circumstances should a postmaster tear the wrapper of any packet or package passing through his office. If he cannot determine the contents of a package passing at less than letter rates without destroying the wrapper, he should charge it up with letter postage, to be collected on delivery. A postmaster who goes outside of the delivery of his office to sell postage stamps, stamped envelopes, or newspaper wrappers, or who uses them for the purpose of discharging his private obligations, will be promptly removed if reported to the Post-Office department.—[Washington Chronicle.

—TOLEDO, Ohio, has a Guybord case. In the common pleas court which sits in that city, an injunction was recently applied for by John Wynn, against Rev. Jas. O'Reilly, pastor of St. Francis De Sales Catholic church, to restrain the latter from interfering with the burial of the body of Mrs. Mary Wynn, wife of plaintiff, in St. Francis De Sales cemetery at that place. It appears that the family of Mrs. Wynn own a lot in that cemetery, in which they desired to bury her; but after preparations for burial had been made, Wynn was notified by Father O'Reilly that he would oppose it, if necessary, by force. The remains were deposited temporarily in a vault in Forest cemetery where they now are, and Wynn applied for an injunction to prevent interference with the interment. Father O'Reilly in his answer, sets forth that the cemetery is under control of the bishop of the diocese of Cleveland, and that the rules of the Catholic church make it obligatory upon the bishop or his representative to refuse to permit to be interred therein any persons of whom full proof of membership is not furnished, and that they died in full communion; that Mrs. Wynn had, for a long time prior to her decease, ceased to be a member of the Roman Catholic church, and died out of communion. The court reserved its decision. Meanwhile the case of Guybord, involving the same question with reference to an excommunicated Catholic in Canada, has just been determined by the English Privy Council against the church, and the parish priest announces his readiness to go to jail rather than obey the mandate. Well, let him go. But is it not a little singular that Guybord himself, the man who, it should seem, would be, of all others, most interested, makes no complaint?

—MANY of the reports which come to us continue to have cases on breach of promise of marriage, and courts of original jurisdiction in England and the United States, are frequently called upon to try such cases. But there are many reasons why this species of action should be abolished. In France there has been much discussion of the subject. The declaration of November 26, 1639, art. 7, enacted that the courts should not receive proof of a promise of marriage, except in writing. The Code Napoleon was silent on the subject. Some French writers, as Toullier, Merlin and Rolland de Villargues, are of opinion that promises of marriage are valid. But Pezzani, in his *Empechements du Mariage*, gives some strong reasons why no action should lie for damages for breach of promise. He contends that the enforcement of such a promise, when against the will of either party, would be against public policy; and that the original obligation being void, the accessory obligation of damages is void, on the principle that *quod nullum est, nullum produicit effectum.* Duranton was also opposed to allowing damages in such cases. If the sentiment of society will not deter individuals from resorting to courts for redress for breach of promise, the legislature ought to abrogate this remedy. Where parties are well acquainted with each other's circumstances, as they surely ought to be before entering upon so important an engagement, there is no sound principle of law which can sustain an action for the failure to perform an engagement of this character. If there is deceit or imposture on the part of either of the parties, there might be a remedy in another form; but there should not be a remedy as for the breach of the promise of marriage.—[*Albany Law Journal.*

—THE evidence of husband and wife, in criminal cases, still remains in that barbarous state from which this branch of our law has gradually become civilized, of late years, mainly through the influence of Bentham. The absurd theory of interested witnesses being incapable of giving evidence, is here, and here alone, maintained. The times when parties could not be called to prove their own case, are now some distance backward: but it was not until the Evidence Amendments Act, 1853, that husband and wife could be witness for, and against each other even in civil cases; and criminal cases were specially excepted. We have, then, this anomaly, which was curiously illustrated about a month ago in one of our police courts. One man summoned another for an assault, and the only witnesses present were the wives of each: the complainant could, and did, call his wife in support of his statement; but when the defendant, who said the other man struck the first blow, was going to call his wife, he was told that could not be done, because she was his wife. The astonished defendant thought this was hardly fair, and said so: while we may also think that the complainant's wife was as much an interested witness as the defendant's; and if the evidence of the one could be taken by the magistrate, with this allowance, so could that of the other. Moreover, who can be more deeply interested in the fate of a child than its father or mother? Yet they may be heard in its favor. If the present anomaly is founded on the idea that man and wife are one, then why was the concession made in civil cases? and the same answer applies if it is a remnant of the theory of interested witnesses being incapable. But if, as seems most likely, it is a relic of that curious state of the law when, although a man was in theory presumed innocent, small chance was left him to prove it, by not even allowing him counsel for his defence, then in the interests of justice and common sense, the sooner it is done away with, the better.—[*The Law.*